No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER DAVE PERNELL

NORMAN C. BARNETT
471 H Street, N.W.
Washington, D.C. 20001

MICHAEL BOUDIN
MICHAEL A. SCHLANGER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
Dave Pernell

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This brief is submitted in reply to the brief of respondent Southall Realty and to the brief of the *amicus curiae* Apartment House Council of Metropolitan Washington, Inc. ("AHC").[1]

[1] The Apartment House Council, which supports Southall and opposes trial by jury in eviction proceedings, is an organization representing the interests of landlords. Its brief (p. 2) states that its members own or manage approximately 200,000 apartment units in the District and surrounding suburban areas.

I. THE SEVENTH AMENDMENT GUARANTEES A RIGHT OF TRIAL BY JURY IN THE DISTRICT'S STATUTORY EVICTION PROCEEDING.

For more than a century and a half, this Court has consistently read the Seventh Amendment as embodying an historical standard and, in the case of a statutory proceeding, has analogized the statutory claim to its closest historical counterparts for purposes of determining the right of jury trial. *E.g., Luria v. United States*, 231 U.S. 9, 27-28 (1913). Whether a modern action is in the nature of a suit at common law has been deemed to turn not on the transient forms of the action but on the substance of the right being enforced and the remedy sought. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830). Applying this historical test, the closest counterparts to the present District statutory eviction proceeding are common law actions all of which adjudicated the right to possession, all of which provided the remedy of eviction, and all of which involved trial by jury. Pernell Br. 25-31.

In addition, this Court, the lower courts and the commentators have repeatedly emphasized that suits to determine the right to possession of real property are classic common law actions triable to juries as of right.[2] The factual issues normally presented in eviction proceedings are peculiarly susceptible to jury determination and, in view of the social interests involved, a jury trial is highly appropriate. Finally, claims of inconvenience and delay alleged to result from jury trial in such cases are

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[2] *E.g., Ross v. Bernhard*, 396 U.S. 531, 533 (1970); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891); *National Life Ins. Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2316, at 77 (1971).

belied by the fact that juries were used in the District's statutory eviction proceeding for 170 years and continue to be used widely by many states in comparable statutory eviction proceedings. Pernell Br. 31-37.

Southall and AHC do not dispute that the historical test governs the application of the Seventh Amendment or that in applying that test, new statutory proceedings must be measured against common law counterparts. Neither of them denies that there did exist at common law several actions triable to juries which, like the present proceeding, adjudicated the right to possession and provided a remedy of eviction; and neither asserts that the District's proceeding corresponds to any recognizable proceeding in equity or admiralty in the English courts. The varying arguments Southall and AHC each advance against affording a jury trial in the statutory eviction proceeding do not withstand analysis.

The lower court in denying a jury trial relied principally upon this Court's decision in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899). The decision below reasoned that since in 1899 this Court held that a jury trial before a justice of the peace did not satisfy the demands of the Seventh Amendment, it followed that the use of that mode of trial in the District's statutory eviction proceeding during the nineteenth century showed that the proceeding did not correspond to a common law action triable to a common law jury. Both Southall and AHC echo the claim that the justice of the peace jury trial is not a Seventh Amendment jury trial, but each hesitates to rely directly on *Hof* to show that

the eviction proceeding is not subject to the Seventh Amendment.[3] Their caution is well justified.

As Pernell has previously demonstrated, a justice of the peace jury trial was commonly regarded as satisfying the demands of the Seventh Amendment when, in the early part of the nineteenth century, the Maryland statutory eviction proceeding utilizing a justice of the peace jury was incorporated into District law. Pernell Br. 38. That this view of the courts was subsequently held erroneous in *Hof* merely indicates that parties to the statutory eviction proceeding should have been afforded a judge as well as a jury in the nineteenth century.[4] *Hof* has no application to the present case since the statutory eviction proceeding is now within the jurisdiction of a court of record presided over by a judge and fully competent to provide a trial by jury in the full Seventh Amendment sense.

The error of the lower court's reasoning is apparent when it is recognized that from 1823 onward the

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[3] Southall's brief repeats the claim that a justice of the peace jury is not equivalent to a Seventh Amendment jury (pp. 9-11) but, instead of drawing the lower court's erroneous conclusion, it switches abruptly to its forcible entry and detainer argument (pp. 11-18). The attempted FED analogy is one which the lower court never even suggested; and Southall's effort to support the lower court's judgment on this novel ground is discussed at pp. 5-9, below. AHC concedes that *Hof's* determination that a justice of the peace jury is inadequate for Seventh Amendment purposes does not "end the inquiry"; rather AHC acknowledges that the "constitutional jury trial question is to be resolved by fitting the [present] cause into its nearest historical analogy." AHC Br. 14-15.

[4] At least after 1864, a party to the statutory eviction proceeding could obtain a jury trial presided over by a judge in a court of record. Under the governing statute enacted in that year, trial by jury *de novo* in the District's Supreme Court was specifically contemplated. Pernell Br. 4.

District's justice of the peace court had jurisdiction of civil debt and damage claims up to $50. 3 Stat. 743. Thus, a debt claim for more than $20 could be tried by a jury presided over by a justice of the peace during most of the nineteenth century. It is now settled by *Hof* that, judged in retrospect, a justice of the peace jury trial standing alone was not adequate under Seventh Amendment standards. Yet no one supposes that this fact could be utilized to deny parties to a $50 debt action in the Superior Court today a trial by jury under the Seventh Amendment.

Southall's own main argument against a jury is quite different. It asserts that the true ancestor of the present statutory proceeding is not the common law possessory actions triable to a jury, such as novel disseisin and ejectment, but rather the statutory forcible entry and detainer action which developed in England beginning in the fourteenth century. Southall Br. 11-18. These FED statutes were designed to remedy breaches of the peace by punishing forcible entries into, or forcible detentions of, real property, and trials in such proceedings could be presided over by justices of the peace.[5] There are decisive

[5] While the District's justice of the peace court considered in *Hof* lacked the formalities and the powers of a common law court, the justice of the peace proceedings in England were quite different. The English justice of the peace court was a court of record; its original jurisdiction extended to virtually all felonies except treason and to limited administrative and civil jurisdiction as well; it employed a twelve-man jury; and its procedures were quite elaborate. See, *e.g.*, IV W. Holdsworth, *History of English Law* 138-150 (1924) (hereafter "Holdsworth"); C. Beard, *The Office of Justice of the Peace in England* 158-64 (1967 ed.) (hereafter "Beard"); McVicker, "The Seventeenth Century Justice of the Peace in England," 24 *Ky. L.J.* 387, 403-07 (1936).

differences between the English FED action and the present District proceeding.

The FED statutes in England, quite unlike the present District proceeding and many modern American statutes of the same name, were criminal statutes.[6] In origin, they provided only for imprisonment and fine of one who forcibly entered and took possession of real property. 5 Rich. II, c. 7; 15 Rich. II, c. 2. By a later enactment, the offense was extended to a peaceable entry followed by a forcible detention; and, in addition to the imprisonment and fine, the justice of the peace was directed to restore possession to the dispossessed party and the latter was afforded a treble damage remedy by assize of novel disseisin or trespass against the wrongful party. 8 Hen. VI, c. 9. The FED action was prosecuted through the usual criminal process.[7]

Even more important, the English FED proceeding did *not* adjudicate the right to possession (4 Blackstone *148), and in this critical respect it differed both from common law remedies such as ejectment and from the District's statutory eviction proceeding. The convicted defendant in an FED action in England might well have

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[6] In classifying and describing public wrongs, which comprised crimes and misdemeanors, Blackstone stated: "An eighth offense against the public peace is that of a *forcible entry* or *detainer*, which is committed by violently taking or keeping possession of lands or tenements, with menaces, force, and arms and without the authority of law." 4 Blackstone, *Commentaries* *148 (hereafter "Blackstone").

[7] Thus, the proceeding was brought in the name of the state; it involved arrest of the wrongdoer and was initiated by indictment; it was regularly tried at the justice of the peace's quarter sessions; and the gravamen of the charge was the unlawful use of force. See 8 Hen. VI, c. 9; *The King v. Wilson*, 8 Tr. 357, 101 Eng. Rep. 1432 (K.B. 1799); 4 Blackstone *148; II Holdsworth 452-53.

the better right to possession of the disputed property: the fault for which he was punished was the use of forcible self-help, and after the *status quo ante* had been restored, he remained entitled to use the normal civil remedies such as ejectment to regain possession. These principles are apparent from an examination of the English statutes cited above and the commentators, and they are confirmed by this Court's exposition of the forcible entry and detainer action in *Iron M. & H.R.R. v. Johnson*, 119 U.S. 608 (1887).[8]

Despite these differences, it is noteworthy that forcible entry and detainer actions did make use of the jury, at least for purposes of restoring to possession one wrongfully ousted by force. See 8 Hen. VI, c. 9; *Ford's Case*, Cro. Jac. 151, 79 Eng. Rep. 132 (K.B. 1607); Beard 68. Jury trials in the English justice of the peace court "proceeded in the manner of an ordinary jury trial in the king's court." Beard 161-62. Thus, even for the limited determination of property interests possible in an FED action, the tradition of jury trial prevailed.

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[8]The Court stated: "The general purpose of these [forcible entry and detainer] statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or *may have the better right to the present possession* but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in *statu quo*, or in the same position as they were before the use of violence, *the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance.*" *Id.* at 611 (emphasis added).

Southall's attempted analogy also ignores the actual evolution of the District proceeding. Initially, the District statute was confined to adjudicating the right of possession in landlord and tenant disputes and made no reference to forcible entries and detainers. Between 1864 and 1953, it contained an FED provision *in addition to* the provisions relating to landlord and tenant disputes and other disputes in which the right to possession is actually determined. Pernell Br. 5-6.[9] In 1953, the FED provision was deleted from the statute, and the original provisions concerning landlord and tenant disputes and certain other controversies involving the right of possession were broadened to cover all cases where the right to possession was placed at issue. See *id.* at 6. The present statute now contains no substantive provision whatever embodying the FED action, and only the phrase remains as a misnomered caption.

Whatever name may be given to the District's present statute, today it is in substance a civil proceeding to determine the right to possession of real property; the actions which did so in 1791 in England were common law actions triable to a jury.[10] Even if the present District proceeding were regarded as a descendant of the English FED action as well as the progeny of novel disseisin and ejectment, it would not affect the outcome of this case.

[9]Under the 1864 statute, the eviction proceeding extended to two essentially different classes of cases: (1) "forcible entry" and "possession unlawfully held by force"; and (2) "possession . . . held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise . . . ." 13 Stat. 383.

[10]It appears that the classical forcible entry and detainer proceeding began to fall into disuse as early as the seventeenth century. See E. Jenks, *A Short History of English Law* 177 (4th ed. 1928).

For, at its present stage of evolution, the District proceeding corresponds to the common law civil possessory actions in terms of the right involved and the function performed. No one would contend that a civil trespass action is not subject to the Seventh Amendment, even though it is well settled that in origin trespass was a criminal proceeding. II F. Pollack & F. Maitland, *History of English Law* 620 (2d ed. 1968).

AHC has not argued that the District proceeding corresponds to the English FED proceeding, nor has AHC sought to justify denial of jury trial on the gound that the District proceeding corresponds to any known equitable action where a trial by jury was unavailable in 1791. Instead it simply appears to assert that the proceeding is a statutory one which differs in certain procedural respects from common law proceedings such as novel disseisin and ejectment. The distinctions are mistaken and would not in any event justify denial of jury trial in the present case.

First, AHC seeks to distinguish novel disseisin on the ground that the jury there involved was analogous to the panel held in *Hof* not to constitute a common law jury. AHC Br. 16-17. Apparently it believes that in novel disseisin, as in *Hof*, the jurors were not under the supervision of a full-fledged judge and therefore could not constitute a true jury. In fact, novel disseisin proceedings were tried not before sheriffs or justices of the peace but before the king's justices either in their home courts or traveling on circuit.[11] Novel disseisin is, in fact, one of the root sources of the jury in the English common law courts in numerous actions including ejectment which developed in subsequent years.

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[11] I Holdsworth 276; D. Sutherland, *The Assize of Novel Disseisin* 59-60 (1973) (hereafter "Sutherland"); Magna Carta, cc. 18-19 (quoted in Sutherland 60).

Reference to novel disseisin also serves to confirm that there is no doctrinal inconsistency between a swift and summary action and the use of trial by jury. Compare Southall Br. 13-15. While jury trial was central to the action of novel disseisin (Sutherland 18), "rules intended to expedite the case were woven into every stage, continually shaping the proceedings." *Id.* at 20.[12] The combination of speed and "a rational form of proof, namely, trial by jury" (*id.* at 38) were among the very elements that made the action so popular for centuries as the foremost means of resolving disputes over possession. *Id.* at 35-40.

Second, AHC asserts that the District proceeding cannot constitute ejectment because D.C. Code §16-1124 (1967) contains an action allegedly corresponding to common law ejectment. That action is not common law ejectment but merely one of ejectment's modern descendants. Pernell Br. 30. The District's statutory remedy is no less a descendant of common law ejectment and the decisions in the District have over the course of many years repeatedly referred to the District's statutory remedy as comprising a "substitute" for ejectment.[13]

Ejectment was the latest of a long series of common law actions tried to juries which evolved to determine the

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[12]Bracton said that assize proceeded "by summary investigation" and the statute of Westminster II stated: "There is no other writ . . . that gives plaintiffs such quick justice as does the writ of novel disseisin." See Sutherland 126-27.

[13]*E.g.*, *Shapiro v. Christopher*, 90 U.S. App. D.C. 114, 123, 195 F.2d 785, 794 (D.C. Cir. 1952); *Service Parking Corp. v. Trans-Lux Radio City Corp.*, 47 A.2d 400, 403 (D.C. Mun. App. 1946); *Shipley v. Major*, 44 A.2d 540, 541 (D.C. Mun. App. 1945); *Lenox v. Arguelles*, 4 D.C. 477, Fed. Cas. No. 8244 (C.C.D.C. 1834) (referring to original Maryland statutory proceeding).

right to possession of real property.[14] By 1791, it was certainly the preeminent means of determining the right to possession of real property in the English courts (VI Holdsworth 625-26), although older common law actions to recover real property were intermittently employed well into the nineteenth century. VII Holdsworth 22-23. If the historical test sanctioned by this Court is followed, it is clear that at the time the Seventh Amendment was adopted, actions to determine the right to possession of real property were suits at common law triable to a jury.

AHC's attempted distinctions misconceive the standard to be applied under the Seventh Amendment in comparing common law actions with modern statutory proceedings. From *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), through *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), this Court has declared that the amendment embraces "not merely suits, which the common law recognized among its old and settled proceedings" but "all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." What is decisive for constitutional purposes is the basic correspondence between the right and remedy in the English common law actions tried to juries and the present District proceeding.

The basic correspondence between the common law actions and the subsequently devised statutory eviction proceedings is acknowledged by the very authorities relied on by AHC. Thus, Thompson on *Real Property*,

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[14]These actions were not, of course, limited to the three principally discussed in the briefs—novel disseisin, entry and ejectment. Others, adapted to particular contingencies, are described in F. Maitland, *The Forms of Action at Common Law* 29-33 (1962 ed.).

partially quoted by AHC Br. 11, confirms this relationship by describing the eviction statutes in these terms:

> "They are designed as statutes for relief, not to create new causes of action. The evident intention is to give this summary relief in those cases where for breach of such [lease] stipulations the action of ejectment would lie. This throws every case upon the ground where the matter rests at common law, the statute having simply the effect of affording a speedy and summary restitution of the premises in cases where the party would otherwise be under the necessity of resorting to an action of ejectment." 3A G. Thompson, *Real Property* §1370, at 719 (1959 Rep. Vol.).

In brief, the procedures have been improved by statute but the substance has not been altered, and in this situation *Parsons v. Bedford* and a century of subsequent decisions of this Court confirm that the Seventh Amendment applies with full force and effect.[15]

Finally, in view of Southall's reference to the number of landlord and tenant cases initiated each year in the

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[15] AHC's other principal authorities are unhelpful to its position. It is not clear that the language it quotes from *Harris v. Barber*, 129 U.S. 366, 369 (1889), was directed to the District's statute at all and certainly it was not directed to the Seventh Amendment issue presented in this case. *Cameron v. United States*, 148 U.S. 301 (1893), involved a proceeding to remove unlawful fences, not an eviction proceeding. As for the state decisions, their treatment of jury trial in statutory eviction proceedings is not of great moment since the states are not subject to the Seventh Amendment (compare AHC Br. 13), but a large number of states do provide jury trials in such proceedings. See, *e.g.*, *Missildine v. Brightman*, 234 Iowa 1053, 14 N.W.2d 700 (1944), and other authorities cited at Pernell Br. 36, n. 37.

District, it is appropriate to refer briefly to this consideration. The same passage quoted by Southall's brief (pp. 30-31) demonstrates that about 97 percent of the cases filed never get beyond the threshold stage. *Tutt v. Doby*, 148 U.S. App. D.C. 171, 176, 459 F.2d 1195, 1200 (D.C. Cir. 1972). Almost all of the cases are terminated without trial as a result of default by the tenant, settlement of the action, or its abandonment by the landlord.

The statistics of the Superior Court show that even when jury trial could be demanded as a matter of course in the statutory eviction proceeding, it was sought only in a limited number of cases. Thus, in 1971, the year *before* the decision below terminated the prospect of jury trial in eviction cases,[16] only 650 jury demands were made in new landlord and tenant cases. 1971 *Annual Report of the District of Columbia Courts*, at A-8.[17] Of these 650 cases, the vast majority were then resolved without trial and 8 of the 17 cases actually brought to jury trial were settled in the course of the trial. *Id.* In short, there is no basis in past experience for any inference that the use of jury trials in landlord and tenant cases is unmanageable.

The conclusive answer to any such suggestion is, of course, the fact that jury trial has been available in

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[16]In 1971 the judges in the Superior Court were taking "conflicting positions" on whether a jury could be claimed in eviction proceedings (A. 14), but the Court of Appeals had not resolved the question. Accordingly, it was sensible for a tenant to demand a jury trial if, as in the present case, he wanted one.

[17]The annual report shows the following dispositions of the 650 cases: trial (17); judgment (162); settled (158); dismissed (106); no disposition (87); pending (13); jury withdrawn (94). *Id.*

eviction proceedings in the District of Columbia virtually throughout its history, until in 1970 the statutory guarantee was repealed without any intention by Congress to alter existing rights to jury trial. See Pernell Br. 3-6. Trial by jury continues to be provided in statutory eviction proceedings in a large number of states. *Id.* at 36, n.37. Since such proceedings may ultimately deprive a man and his family of their home, it is difficult to imagine a civil proceeding in which the intervention of a jury is more appropriate.

II. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT OF JURY TRIAL WITH RESPECT TO THE TENANT'S CLAIMS FOR MONEY DAMAGES.

Independent of Pernell's right to trial by jury in defending against Southall's claim to possession, Pernell was also entitled to jury trial on his own claims for money damages against Southall. These claims were based on rent paid while the premises were not in a habitable condition and for expenditures made to render them habitable. The claims derive from the asserted breach by Southall of its implied warranty to maintain the premises in a habitable condition in accordance with the District's housing regulations (*Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 428 F.2d 1071, *cert. denied*, 400 U.S. 925 (1970)) and the claims represented the assertion of "the usual remedies for breach of contract." *Id.* at 369, 428 F.2d at 1071.[18]

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[18]Only recently, the District of Columbia Court of Appeals characterized the holding of *Javins* in these terms: "The court [in *Javins*] held that with respect to urban rental housing, there is

It is familiar law that contract claims for money damages are common law claims triable to a jury as of right. See, *e.g.*, *Simler v. Conner*, 372 U.S. 221 (1963). Pernell's opening brief (p. 46) showed that suits for breach of warranty have been frequent subjects of litigation in the common law courts ever since the Middle Ages, the action being cast originally in tort and, since the 1800's, more frequently in contract. In either event, the action is a common law suit triable to a jury. *Id.* at 44-47. None of these premises is disputed by Southall or AHC, nor could they fairly be disputed.

Southall's main response appears to be the dual contention that either Pernell was not actually seeking affirmative money damages or, alternatively, that the Constitution or local court rules forbid such claims in the statutory eviction proceeding. If these are indeed Southall's contentions, each of them is without merit. Pernell's answer in the trial court alleged that the premises rented had not been maintained by Southall in a safe and habitable condition and expressly "denie[d] that any rent is owing" to Southall (A. 11). In addition, Pernell expressly asserted money damage claims against Southall, based on payments of rent by him to Southall and on expenditures made to bring the premises into a more habitable condition (A. 13).

Under *Javins*, if Pernell had established at trial before a jury that the premises were not habitably maintained,

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implied by operation of law a warranty of habitability measured by the Housing Regulations of the District of Columbia. In so deciding, the court stated that leases of urban dwelling units should be interpreted and construed like any other contract." *Interstate Restaurants, Inc. v. Halsa Corp.*, 101 D.W.L.R. 1929, 1936 (D.C. Ct. App. 1973).

then the jury could have concluded that little or no rent was owing to Southall. 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83. And, if the jury had also concluded that Pernell had paid rent to Southall in some amount and made further expenditures to bring the premises into habitable condition, thus fulfilling the landlord's own obligation, then under District law the jury could have awarded Pernell money damages for the amounts expended. See *Clover v. Shapiro*, 99 D.W.L.R. 1897 (D.C. Superior Ct. 1971).[19]

Since the jury is free to determine that the landlord's dereliction has wholly abated his right to rent, it could in this case have found that Pernell owed nothing whatever. If it also found that Pernell had in fact paid $75 in rent and expended $389.60 for repairs made to bring the premises into partial compliance with the District's housing regulations, then it could have awarded Pernell $464.60. Or, if the landlord's actions were found to reduce the amount of rent owing without eliminating it altogether, then Pernell would have been entitled to recover the difference between the amounts he paid or expended and any lesser sum which he was found to owe. See *Clover v. Shapiro, supra*, 99 D.W.L.R. at 1902.

What is apparent is that Pernell assuredly did make claims that, if sustained, would have entitled him to damages. The rules and decisions of the Superior Court of

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[19] *Clover* specifically considered the question whether the landlord's breach of his obligation under *Javins* could give rise to money damage claims and decided this question in the affirmative. Among the several alternative theories of recovery sustained in *Clover* were contractual claims both for rent paid and improvements made. 99 D.W.L.R. at 1901.

the District of Columbia contemplate that such recovery may be had in a statutory eviction proceeding. Landlord and Tenant Rule 5(b) provides that the tenant may respond to an eviction claim by making his own claim "for a money judgment based on the payment of rent or on expenditures claimed as credit against rent . . . ." The lower court in this case did not deny that such a claim could be made but merely asserted that the tenant was not entitled to trial by jury with respect to the claim.[20]

Southall's constitutional objection is still more far-fetched. Its brief seems to urge that it constitutes a denial of property without due process of law to permit the tenant to assert his affirmative money damage claims in an eviction proceeding. The brief states, for example, that "for a rule of court to be applied to compel a landlord to maintain a tenant with no right to possession in possession while the tenant asserts a claim for a money judgment raised as a legal defense by the tenant as a counterclaim is a deprivation of the landlord's property rights." Southall Br. 27. Southall's argument is lacking in logic and devoid of support in the precedents cited to sustain it.

Among other fallacies, Southall's argument ignores the fact that in the normal case both the landlord's eviction claim and the tenant's claim for damages grow out of a

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[20]Consequently, there is no need to discuss Southall's citation of cases from certain other jurisdictions in which tenants are not entitled to assert money damage claims in the course of eviction proceedings but are required to reserve them for separate proceedings after the eviction claims have been resolved. Southall Br. 28. Southall cannot rewrite the District's law by showing that the law is different in other jurisdictions.

common core of facts and present overlapping issues. Thus, it takes little added time to dispose of the tenant's damage claim in the same trial that resolves the landlord's right to possession. Moreover, Southall's reasoning appears to depend on the assumption that the landlord has a right to immediate possession of the property. But if Pernell's allegations were established, it would follow under District law that the landlord had no right to possession and, in addition, that Pernell had a right to money damages based upon the same default of the landlord that abated his own right to rent.

The cases cited by Southall in connection with its constitutional argument indicated only that it may be constitutionally *permissible* for a state to require in certain circumstances that an initial proceeding be confined to litigating the right to possession of property and that other claims or issues, which might normally be tried in the same proceeding, be reserved for subsequent litigation.[21] None of these cases held or even hinted that a state is constitutionally *compelled* to require such a separation in any circumstances, and, so far as the money damage claims asserted by Pernell are concerned, Landlord and Tenant Rule 5(b) expressly allows them to be asserted.[22]

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[21] See *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915); *Bianchi v. Morales*, 262 U.S. 170 (1923); *Lindsey v. Normet*, 405 U.S. 56 (1972).

[22] Southall's constitutional claim is especially incongruous because Southall clearly could assert a money damage claim in the eviction proceeding for rent due against Pernell either by making personal service of the complaint, or even without such service, because Pernell had asserted his own money damage claims. See Landlord and Tenant Rule 3.

Not only is there no constitutional compulsion to separate related claims, but the plain trend of the law is in the opposite direction. Modern practice looks to the resolution in a single proceeding of all claims growing out of a common core of facts. *E.g.*, Fed. R. Civ. P. 13(a) (compulsory counterclaims); 14 (third-party claims); 23 (class actions). See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). This Court has also emphasized that, where possible, the same trier of fact should resolve related claims.[23] Whether resolution of related claims in a single proceeding is compelled by local rules or merely permitted, certainly the basic approach is not unconstitutional.

AHC's argument in opposition to a jury trial on Pernell's damage claims is not entirely clear but appears to have a two-fold aspect. Initially, AHC repeats the lower court's assertion that the obligation of a landlord to maintain habitable premises did not exist in 1791 and therefore that claims and defenses arising from such an obligation cannot be pursued in common law proceedings. AHC Br. 17-20. Pernell's claims, however, are contract claims based on a breach of warranty. While the particular contract term at issue is one designed for modern conditions, this does not alter the fact that it is sought to be enforced through a common law action which has been tried to a jury for centuries.

Plainly, many contract actions involve subjects and enforce substantive terms quite unfamiliar to residents of England in 1791, but trial by jury may not be withheld

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[23] *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Katchen v. Landy*, 382 U.S. 323 (1966). See also *Beacon Theatres v. Westover*, 359 U.S. 500, 508 (1959).

on this account. See *Dairy Queen v. Wood*, 369 U.S. 469 (1962) (franchise agreement); *Simler v. Conner, supra* (contingent fee contract). It is the nature of the claim—which here involves contractual rights enforced through a request for money damages—that invokes the right to jury trial. See *Ross v. Bernhard, supra; Parsons v. Bedford, supra.*[24]

Alternatively, AHC also repeats the lower court's statement that Pernell was advancing "equitable" defenses of setoff and recoupment.[25] Pernell's opening brief (p. 48 & n.47) showed that recoupment is incontestably a long standing common law device and that setoff was enforced at law as well as equity prior to the Seventh Amendment. These devices could not in any event determine whether a particular claim is legal or equitable for Seventh Amendment purposes, because they do not relate to the nature of the claim but rather to *when* a responsive claim may be asserted in the same action by a defendant in response to a plaintiff's claim.[26]

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[24]The Uniform Commercial Code, for example, has significantly altered substantive common law doctrine in a number of respects. Yet no one would suggest that a contract suit for damages based on the Code would fall outside the Seventh Amendment because more modern rules have been adopted to govern commercial transactions.

[25]The lower court's characterization is obviously not controlling. A subordinate tribunal cannot by making findings or applying labels prevent the full and effective assertion of a constitutional right and, where those findings or labels are decisive, it is this Court that must make the ultimate determination. See, *e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

[26]Under the technical common law rules, recoupment permitted the defendant to reduce or eliminate a claim against him by

Since in this instance Southall's claims for money damages were based on breach of contract, they are necessarily common law claims triable to a jury.

Moreover, Pernell was not seeking merely to reduce or eliminate claims made by Southall which is the conventional office of recoupment and setoff. James §10.15, at 479. His pleadings specifically sought affirmative money damages on his own behalf. See p. 15, above. In conventional terms, Pernell's demand for affirmative relief is most appropriately described as a counterclaim.[27] Of course, legal as well as equitable claims may be asserted by way of counterclaim (*e.g., Beacon Theatres v. Westover, supra*) and in this case Pernell's demand was legal because of the nature of the underlying right and the remedy sought.

Finally, both Southall and AHC assert that Pernell has improperly relied on *Beacon Theatres, Inc. v. Westover, supra*, and *Dairy Queen, Inc. v. Wood, supra*. But the

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asserting to that extent his own claim against the plaintiff arising out of the same transaction; for example, a contractual claim by the seller based on the sale of goods could be reduced or eliminated by the buyer's responsive claim for breach of warranty of the goods sold. *E.g., Withers v. Greene*, 50 U.S. (9 How.) 213 (1850). Setoff performed the same basic function; unlike recoupment, however, the responsive claim did not have to arise out of the same transaction but it did need to be liquidated or easily subject to computation. F. James, *Civil Procedure* §10.15 (1965) (hereafter "James").

[27]Counterclaims "for a money judgment based on the payment of rent or on expenditures claimed as credit against rent" are expressly permitted by Landlord and Tenant Rule 5(b). Pernell's demand for affirmative relief was based both on payment of rent and on expenditures claimed as credit against rent.

nature of their attempted distinctions suggests that they have misapprehended the relevance of the cases in question to the present proceeding. See Southall Br. 22-25; AHC Br. 20. In those cases this Court addressed itself to the new situation created by the merger of law and equity, and it acknowledged a rule of priority normally to be applied where legal and equitable claims and defenses are asserted in the same proceeding.[28] The question of priority will never be reached, however, if this Court sustains Pernell's primary contentions.

Should this Court agree with Pernell that he is entitled to a trial by jury independently both on his defense of the eviction claim made by Southall and on his own assertion of contract claims for money damages, then no problem of priority is presented. On these premises, Pernell would be entitled to a jury trial on each claim if they were asserted in separate proceedings, and the right to jury trial obviously is not lost because two claims otherwise triable to a jury are combined in a single case. Thus, in the event this Court upholds Pernell's position, the question of priority as between legal and equitable issues cannot arise.

If, on the other hand, this Court concludes that Pernell is entitled to a jury trial with respect to one of the claims but not the other, then *Beacon Theatres* and *Dairy Queen*

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[28]Speaking of *Beacon Theatres* and *Dairy Queen*, this Court recently stated in *Ross v. Bernhard* that "under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." 396 U.S. at 537-38.

would be relevant. Under the priority rule established by those cases, the host of factual issues common to the eviction claims and the claims for money damages should be submitted to the jury. See p. 22, n.28, above. Assuming that there may ever be circumstances in which the priority rule does not apply, no such circumstances have been or could be asserted in this case. Certainly there can be no contention here that Congress has made a specific determination to undo the usual order of trial favoring Seventh Amendment interests. Compare *Katchen v. Landy, supra.*[29]

If *Beacon Theatres* and *Dairy Queen* have any other significance, it lies in their repeated emphasis that every fair doubt is to be resolved in favor of trial by jury wherever the matter is within the control of a court subject to the Seventh Amendment. This principle is one of the oldest traditions of constitutional adjudication, harking back to decisions such as *Parsons v. Bedford, supra,* and continuing to the present day. *E.g., Ross v. Bernhard, supra.* And it rests upon deeply-felt benefits

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[29]The legislative history cited in Pernell's opening brief (p. 6) amply demonstrates that the statutory guarantee which assured civil jury trials in a broad class of cases, including eviction proceedings, was repealed because Congress believed it to be "superfluous in light of constitutional jury trial requirements." This showing is based on explicit language in the report of the House Committee, whose treatment of the matter prevailed (H. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970)), and is obviously not impaired by showing that the Senate considered retaining the statutory guarantee for other reasons (AHC Br. 6, n. 4) or that a statutory guarantee of jury trial in criminal cases was retained in another portion of the District of Columbia Code (Southall Br. 19).

that derive from use of jury trial, including the common-sense judgment jurors apply to particular facts, "that flexibility of legal rules which is essential to justice and popular contentment," and its office "as a gratuitous public school" in which citizens share in their own self-government.[30]

Thus, "the federal policy favoring jury trials is of historic and continuing strength." *Simler v. Conner, supra*, 372 U.S. at 222. See also *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In the present case, this tradition buttresses a claim to jury trial firmly rooted in history and policy alike. Taken together these considerations compel the conclusion that the right to trial by jury attaches both to the eviction claim and to the money damage claims asserted in response.

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[30]*Schulz v. Pennsylvania R.R.*, 350 U.S. 523, 526 (1956); Wigmore, "A Program for the Trial of Jury Trial," 12 *J. Am. Jud. Soc'y* 166, 170 (1929); 1 de Tocqueville, *Democracy in America* 296 (Bradley ed. 1945).

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

NORMAN C. BARNETT
471 H Street, N.W.
Washington, D.C. 20001

MICHAEL BOUDIN
MICHAEL A. SCHLANGER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
Dave Pernell

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